IN THE

Supreme Court of the United States

October Term, 1977

No. 77-481

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

against

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, *et ano.*,

Intervenors

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR INTERVENOR, POWER AUTHORITY OF THE STATE OF NEW YORK, IN OPPOSITION

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Opinions Below

The opinion of the panel of the Second Circuit, which preceded *en banc* review (App. C of Pet.),[1] and the opinion of the Second Circuit *en banc* are both reported at 559 F.2d

1. References to material in the Appendix to the Petition herein will be made in this manner.

1227). The portions of the Federal Power Commission (the "FPC") orders which are relevant to this action are annexed to the Petition as Appendices E and F.

Question Presented

Is the Federal Energy Regulatory Commission[2] (Commission or FERC) authorized by law to reimburse intervenors in a licensing proceeding under Part I of the Federal Power Act for counsel fees and expenses?

Statutes Involved

Section 3 (7) of the Federal Power Act (16 U.S.C. §796 (7)) provides:

> "The words defined in this section shall have the following meanings for the purposes of this act, to wit:
>
> "(7) municipality means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power * * *"

Section 10 (e) of the Federal Power Act (16 U.S.C. §803 (e)) provides, in pertinent part:

> "All licenses issued under this Part [Part I] shall be on the following conditions—

2. The licensing jurisdiction of the Federal Power Commission over hydroelectric projects under Part I of the Federal Power Act was delegated to the Federal Energy Regulatory Commission (the "FERC"), an independent commission in the new Department of Energy (the "DOE") effective October 1, 1977. Department of Energy Organization Act, P.L. 95-91, 91 Stat. 565, DOE Delegation Order No. 0204-1, 10 C.F.R. 1001. To avoid confusion and for the sake of consistency with prior proceedings in this litigation most references herein will be to the Federal Power Commission (the "FPC" or "Commission") rather than to FERC.

> "(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of administration of this Part * * *"

Section 3 of the Act of August 15, 1953 (16 U.S.C. §828 (b)) provides, in pertinent part:

> "The Federal Power Commission in determining the amounts of annual charges applicable to any such project [owned by a State or municipality] may determine the annual charges with reference to the actual cost of services incurred by the Commission with respect to the project."

Statement of the Case

Power Authority of the State of New York ("Authority") is a political subdivision of the State of New York (New York Public Authorities Law §1002, McKinney) which qualifies it as a "municipality" under Section 3(7) of the Federal Power Act. On August 15, 1968 the Authority filed an application with the Federal Power Commission for a license under Part I of the Federal Power Act to construct, operate and maintain a pumped storage power plant to be located in the Towns of Blenheim and Gilboa in Schoharie County, New York (the Blenheim-Gilboa Project) including three transmission lines connecting the project to the inter-connected grid in New York State.

The Commission on June 6, 1969 issued a license for the Blenheim-Gilboa Project (Power Authority of the State of New York, Project No. 2685) but requested more detailed information on the transmission lines. There-

able fees and expenses. The court denied the request noting that it could not make such an award "without a clearer congressional mandate", 455 F.2d 412, 426.

A further interlocutory petition for review to the Second Circuit by petitioners, again seeking reimbursement for fees, among other things, was denied in 1973. *Greene County Planning Board* v. *FPC*, 490 F.2d 256 (2d Cir. 1973) (*Greene County II*).

On January 29, 1976 the FPC in Opinion No. 751, *Power Authority of the State of New York Project No. 2685*, approved the transmission line and found on the basis of *Greene County I* (*supra*) and this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) that it had no authority to award counsel fees and expenses to intervenors. The Commission stated that while the intervenors had:

> "* * * every right to present their case as have countless other intervenors in cases before the Commission * * * [t]hese intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably upon its ratepayers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice" FPC Opinion No. 751, p. 21, App. E of Pet. at 41a.

In denying petitions for rehearing the Federal Power Commission again rejected the argument that the Commission or applicant should reimburse the intervenors for fees and expenses. FPC Opinion No. 751-A, April 27, 1976, App. F of Pet. at 42a.

after on November 24, 1969 the Authority filed with the Commission an application for approval of exhibits depicting the locations of the three transmission lines.

In May 1970 leave to intervene in the proceeding with respect to the line from the Blenheim-Gilboa Project to Leeds (a substation located near Catskill, New York) approximately 30 miles from the project, was granted to petitioner herein, Town of Durham, Association for the Preservation of Durham Valley and Greene County Planning Board. A year later the Town of Greenville was granted intervention.

Several of the intervenors, including the Town of Durham and the Association for the Preservation of Durham Valley, filed motions with the Administrative Law Judge and subsequently with the Commission asking that the Commission, or alternatively the Authority pay intervenors' expenses including counsel's fees in the proceeding. The motions were denied by the examiner and by the Commission.

In 1971 hearings on the location and design of the transmission line were interrupted by petitions by petitioners herein, Greene County Planning Board, Town of Durham and Association for the Preservation of Durham Valley to the Court of Appeals for the Second Circuit to review orders of the Commission. These petitions resulted in the decision in *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.) *cert. denied*, 409 U.S. 849 (1972) (*Greene County I*) which, among other things, denied the instant petitioner's request for an order requiring the Commission or in the alternative the Authority to pay their reason-

On September 27, 1976 the intervenors petitioned the Court of Appeals for the Second Circuit for review of the January 29, 1976 FPC decision including the issue of reimbursement for counsel fees and expenses of the intervenors.

On December 8, 1976 a panel of the court unanimously affirmed the determination of the FPC permitting construction, operation and maintenance of the transmission line, but by a two to one vote remanded the fee issue to the Commission for reconsideration in the light of a recent decision of the Comptroller General that the General Accounting Office would not disallow payment of intervenors' expenses in Nuclear Regulatory Commission proceedings even though Congress had not specifically authorized it.

Judge Van Graafeiland in a vigorous dissent from the decision as it applied to the fee issue, stated:

> "I can find no statute which empowers the Comptroller General to issue what is in effect a declaratory judgment clothing the Federal Power Commission with authority to disburse public funds, in the face of the Commission's own determination that it has no such power and this Court's finding in support thereof." 559 F. 2d 1227, 1236; App. C of Pet. at 31a.

Petition for rehearing *en banc* was made by the instant petitioners, Greene County Planning Board and Town of Greenville, on the issue of construction and operation of the transmission line and a petition for rehearing *en banc* on the question of fee and expense reimbursement was made by the FPC. The petition of the FPC was granted and that of Greene County Planning Board and Town of

Greenville was denied on February 15, 1977. By a vote of five to three (two judges not participating) the court of appeals reversed the panel's decision and denied the petition for review on the issue of fees. 559 F.2d 1227, 1238; App. A of Pet. at 1a.

The court, per Judge Graafeiland, based its decision on the *Greene County I* decision which held that the Federal Power Act did not authorize the award of counsel fees (*Id.* at 1239, App. A of Pet. at 5a) and this Court's clear language in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 257 that "absent statute or enforceable contract, litigants pay their own attorneys' fees". 559 F.2d 1227, 1240; App. A of Pet. at 6a. That the Comptroller General opined otherwise was not considered controlling by the court, which held that given the relevant statutes and the limited scope of the Comptroller's legislative mandate, the court's and not the Comptroller's interpretation of the law must control. *Id.* at 1238-9; App. A of Pet. at 4a & 5a. Judge Van Graafeiland, summed up for the majority:

> "The authority of a Commission to disburse funds must come from Congress, * * * and it is for Congress, not the Comptroller General, to set the conditions under which payments, if any, should be made. No officer or agent of the United States may disburse public money unless authorized by Congress to do so." *Id.* at 1239, App. A of Pet. at 6a.

Argument

The issue as to whether the FPC is authorized to reimburse intervenors in Commission proceedings under Part I of the Federal Power Act for their counsel fees and expenses is not novel, unique or worthy of the grant of the extraordinary writ of certiorari. The question is controlled by this Court's 1975 decision in *Alyeska Pipe Line Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) and the earlier holding of the Court of Appeals for the Second Circuit in *Greene County I, Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972). Petitioner's analysis of the statutes and decision attempts to create an issue worthy of review by the Court. The analysis is forced and strained and no worthy issues have been developed. Nor is there any conflict in decisions among the courts of appeals. To the contrary, recent decisions of the courts of appeals for the Tenth Circuit and the District of Columbia Circuit are in complete agreement with the decision below.

Petitioners have drawn an illusory distinction between "fee reimbursement," said by the Comptroller General to be permissible, and "fee shifting," condemned by this Court in *Alyeska* by arguing that the fee will be paid by the FPC, not by the applicant in the proceeding. But by reason of Section 10(e) of the Federal Power Act, 16 U.S.C. §803(e), which requires licensees to pay the cost of administering proceedings under Part I, the cost of funding intervenors' expenses in the instant case would be borne directly, in large part, by the Power Authority. This is

precisely the type of congressionally unauthorized fee shifting so explicitly condemned by this Court in *Alyeska*.

The requirements of the statutes are clear and thus upon these facts the decision of the Second Circuit was manifestly correct and indeed compelled by that court's prior holding in *Greene County I*. Therefore the "issue" by which intervenors attempt to establish their right to a writ of certiorari has been in fact fully resolved by previous decisions of this and other courts.

Petitioners also assert that certiorari should be granted to resolve "confusion" among Executive agencies on the issue of intervenor financing. Pet. at 15. Review of this case must turn on the *specific legislation* governing the FPC in such licensing proceedings, and can shed no light on whether Congress has legislatively mandated reimbursement or shifting of fees in proceedings before other agencies. And, in fact, Congress has before it at least three bills on intervenors' costs in administrative proceedings. See S. 270; H.R. 336 and H.R. 3362. As the Second Circuit *en banc* providently held in the case at bar, "* * * a finding that the Federal Power Commission is empowered to reimburse intervenors for their legal expenses must await appropriate Congressional action." 559 F.2d 1227, 1240; App. A of Pet. at 6a.

I

THE COURT OF APPEALS CORRECTLY HELD THAT THE FPC CANNOT REIMBURSE PETITIONERS FOR THEIR ATTORNEY'S FEES ABSENT EXPLICIT STATUTORY AUTHORIZATION.

The court of appeals *en banc* correctly held that the FPC has no authority to award expenses and fees to intervenors in proceedings under Part I of the Federal Power Act and that the Comptroller General's determination that it would not disallow such payments does not provide such authority.

Contrary to the position of petitioners and the minority of the Second Circuit *en banc*, the Comptroller General's February 19, 1976 letter, *Matter of Costs of Intervention, Nuclear Regulatory Commission*, B-92288 (App. G of Pet.) and a subsequent letter from the Comptroller to the Oversight and Investigations Subcommittee of the House of Representatives Committee on Interstate and Foreign Commerce (App. H of Pet.) do not provide the necessary *Congressional* determination that the award of counsel fees by the Federal Power Commission would be justified. The Comptroller's opinion merely states that in reviewing the accounts of the NRC he will not question such payments if they were awarded to an intervenor who was found by that agency to have rendered assistance in the proceeding and who was determined to have been indigent.

The letter to the Subcommittee expands the application of the NRC letter to other agencies including the FPC despite the fact that the Comptroller did not solicit the views of the agencies concerned and that he rendered the

opinion only on the basis of "* * * some of the statutory and/or regulatory authorities which authorize or direct that public hearings be held for a variety of purposes related to accomplishment of the agency mission" (App. H of Pet. at 77a). This cursory review by the Comptroller is certainly not, nor could it be, the clear congressional mandate which would authorize the FPC to make awards to intervenors with impunity. That the Comptroller would not object does not clothe the payment with legislative authority which the FPC would require to make the payments in the first instance.

In *Greene County I* the court of appeals rejected petitioners' prayer for financial assistance and upheld the Commission's ruling that the Federal Power Act contained no authority to award such funds, stating:

> "[W]e find ourselves in agreement with the Commission's position that at this posture of the proceedings and under current circumstances, without a clearer congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings. * * * We would need a far clearer congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances explicitly to provide for them when to do so was in the public interest." 455 F. 2d 412 at 426

Further the court explained that when Congress has found it to be in the express public interest to authorize administrative agencies to pay counsel fees it has not hesitated to do so with an explicit direction, as in the Clayton Act, 15 U.S.C. §15; the Communications Act of

1934, 47 U.S.C. §206; and the Interstate Commerce Act, 49 U.S.C. §16 (2).

Since the decision in *Greene County I*, Congress has enacted statutes specifically authorizing some agencies to pay counsel fees. See Toxic Substance Control Act, 15 U.S.C. §2620 (4) (c); Clean Air Act, §304 (d). No similar legislation enabling the FPC to make such payments has been enacted.[3]

Subsequent to *Greene County I* this Court decided *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) which, with *Greene County I* was relied upon by the FPC in rendering its order. The *Alyeska* case, which involved environmental challenges to the issuance of permits for the construction of the trans-Alaska oil pipe line, restated the basic "American Rule" applicable to judicial proceedings in the United States that absent a statute or enforceable contract litigants must pay their own counsel fees. 421 U.S. 240, 257.

Alyeska has been held fully applicable to proceedings before federal administrative agencies. In *Turner* v. *FCC*, 514 F.2d 1354 (D.C. Cir. 1975), the court held that the Federal Communications Commission (FCC) could not properly order a licensee to reimburse the legal fees of a complainant without a grant of "clear statutory power" by Congress. 514 F.2d 1354, 1356. As discussed, *infra*, the effect of Section 10(e) of the Federal Power Act is to shift an award of attorney's fees onto licensees.

3. Three bills dealing with the subject of federal agency intervenors' costs collectively known as the "Public Participation in Federal Agency Procedures Act of 1977", S.270, H.R. 3361 and H.R. 3362, are now before the Congress.

But even apart from Section 10(e), it is established that agency reimbursement of legal expenses is equally precluded, absent plain statutory authorization. In *Fitzgerald* v. *United States Civil Service Commission*, 554 F.2d 1186 (D.C. Cir. 1977), the court reversed a district court judgment holding that the Civil Service Commission had authority to reimburse a participant for legal fees in proceedings before it. Relying on *Alyeska*, *supra*, and *United States* v. *Testan*, 424 U.S. 392 (1976), the court concluded:

> "The import of *Alyeska* and *Testan*, we believe, is that a general waiver of sovereign immunity should not be construed to extend to attorney's fees unless Congress has clearly indicated that it should." (554 F.2d 1186, 1189).

The court of appeals for the Tenth Circuit reached the same conclusion in *Trapp* v. *United States* (10th Cir. No. 76-1801, unreported opinion decided January 26, 1977) which emphasized that where Congress has authorized an agency to award attorney's fees it has done so "in no uncertain terms" (sl. op. at 4). *See also Fischer* v. *United States Dep't. of Transportation*, 430 F.Supp. 1349, 1352 (D. Mass. 1977) declining to do "by forced construction what Congress could have done in a specific statute."

As pointed out in *Lythe* v. *Commission of Elections of Union County*, 541 F.2d 421, 424 (4th Cir., 1976) the Supreme Court in *Alyeska* "specifically recognized that it was for the Congress to select, by statutory authorization, those types of actions in which attorney's fees should be awarded."

In view of *Alyeska* and its progeny, the decision of the court of appeals below was indisputably correct and in accord with decisions of the other circuit courts of appeals. Accordingly, petitioners' request for certiorari has no basis.

That a litigant has in some fashion provided a "public benefit" provides no valid basis for an award of counsel fees. As stated in *Wright* v. *Jackson*, 522 F.2d 955 (4th Cir., 1975) "so far as the award of counsel fees on a public benefit basis is concerned: it is not to be done" 522 F.2d at 957.[4]

Petitioners argue that the case at bar involves a novel question of law upon which this Court has not yet but should rule (Pet. at 19). This proposition relies on an asserted distinction between "fee shifting" as conclusively treated in *Alyeska*, and fee "reimbursement", as condoned by the Comptroller General.

Petitioners attempt to distinguish *Alyeska* by citation of the opinion of the Comptroller General which held that an administrative agency can reimburse a prevailing litigant for his expenses on the ground that such "reimbursement" is distinguishable from "fee shifting" because it involves no exercise of compulsion against a private party (App. G of Pet. at 64a). Even assuming *arguendo* that the suggested dichotomy has merit with respect to agencies such as the NRC, it has no application in the FPC's statutory context. Section 10(e) of the Federal Power Act shifts the cost of administering Part I of that Act squarely

4. The alleged benefit here is the selection of a possible better route than might have been chosen absent the intervenors. Petitioner, Greene County, provided no input to route selection, being concerned entirely with preventing the construction of any line.

on licensees thereunder, such as Power Authority,[5] by the imposition of annual charges. Therefore, if payments to intervenors are authorized, such payments would result in increased costs of administration and consequently increased license fees. Thus, payments to intervenors would involve "fee shifting" which was specifically proscribed by the Supreme Court in *Alyeska*.

Licensees and applicants are compelled to pay annual charges to the United States Treasury and it matters not that the FPC would make the payments to intervenors rather than licensees or applicants paying them directly. The exercise of a compulsion against a private person or against the FPC has the same result, the funds of one litigant are paid to his opponents in an adjudicated matter. The fee is shifted no matter what the route and this is not allowed under *Alyeska*.

Petitioners argue that if fee shifting would occur in Part I proceedings such shifting would be *de minimis* with respect to "all taxpayers or all agency licensees" (Pet. at 20 n.17). The facts in the instant case belie this analysis. Power Authority with three major hydroelectric projects licensed under Part I is the largest single state or municipal licensee under that Part in terms of authorized

5. Pursuant to Section 3 of the Act of August 15, 1953 (16 U.S.C. §828b, Power Authority along with all other State and municipal licensees under Part I of the Act pays annual charges to the Commission to cover the costs of administration of that Part with respect to such licensees in the proportion that the total authorized installed capacity in horsepower of each licensee's facilities bears to the aggregate installed capacity of all projects owned by all State and municipal licensees. 18 C.F.R. §11.20(b)(2), (3) (1976).

capacity in horsepower.[6] The annual charges assessed against the Authority for the year 1976 will total $709,004, which represents approximately 27.5 percent of the total $2,582,328 assessed against all state and municipal licensees under Part I pursuant to Section 10(e) thereof and the Commission's regulations, 18 C.F.R. §11.20 *et seq.* To be sure, in light of this, Authority's financial stake in the award of fees to the petitioners is not miniscule. In any event, *Alyeska* does not turn on the amount of fees claimed. There are no exceptions to the American Rule for *de minimis* situations.

The matter is controlled by this Court's recent ruling in *Alyeska* and by the Second Circuit's holding in *Greene County I*, for which this Court denied certiorari in 1972 (409 U.S. 849).

II

THE DECISION OF THE COURT OF APPEALS WAS NOT AN IMPERMISSIVE INVASION OF THE PROVINCE OF THE LEGISLATIVE BRANCH.

The petitioners treat the Comptroller General's opinion as dispositive of the issue thereby ascribing to him a role as a judicial interpreter of statutes and argue that the

6. St. Lawrence Power Project No. 2000, ... 1,250,000 authorized horsepower
Niagara Power Project No. 2216, ... 2,920,000 authorized horsepower
Blenheim - Gilboa Pumped Storage Project No. 2685 (of which the Gilboa Leeds Transmission line, the subject of the instant litigation, is a part) ..... 1,333,000 authorized horsepower

Second Circuit impermissibly invaded the province of the legislative branch. Petitioners' contention would mean that the Comptroller General would be the final arbiter of legislative interpretations rather than the courts. As pointed out by Judge Van Graafeiland in the majority opinion below, the impact of a Comptroller General's opinion is much more limited and is certainly not final:

> "31 U.S.C. §74 [Section 6 of the Dockery Act of 1894 as amended, Pet. at 3] permits the head of an executive department, in his discretion, to apply to the Comptroller General for a commitment in advance that the General Accounting Office will not question the validity of a specific disbursement in passing upon the account of that department [footnote omitted]. *A commitment given in response to such a request operates as a form of estoppel against subsequent challenge by the GAO. It is not, however, a binding legal opinion, but one which may be contested in the courts. * * * It is for the courts to determine the intent of Congress as expressed in its legislative enactments.* In making this determination, as we do in this case, we interfere in no way with the authority of the Comptroller General to approve or disapprove disbursements made by the executive agencies. *We simply hold that the Federal Power Commission has no statutory authority to make the disbursements in question.*" (Emphasis added) 559 F. 2d 1227, 1239; App. A of Pet. at 4a; 5a.

The practical effect of petitioners' argument that the Comptroller's opinion authorizes the FPC to fund intervenor expenses would be to elevate such opinion to a status superior to the courts' interpretations of Congressional enactments.